91-645

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

Leila Buchanan,
Petitioner

v.

First Gibraltar Bank, FSB,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Aaron L. Jackson
Attorney
Ford & Ferraro
98 San Jacinto Blvd.
Suite 2000
Austin, TX 78701
512/476-2020

Attorney for Petitioner,
Leila Buchanan

ISSUE PRESENTED

Whether the Court of Appeals denied equal protection under the law in applying the *D'Oench, Duhme* doctrine to abrogate Buchanan's constitutional right to her homestead: (a) contrary to the ruling by the same Court of Appeals in *Patterson v. Federal Deposit Insurance Corporation*, 918 F.2d 540 (5th Cir. 1990); (b) when Buchanan did not lend herself to a "scheme or arrangement" that was likely to mislead the regulator; and (c) when the regulator had actual and constructive notice of Buchanan's homestead claim at the time of takeover.

LIST OF PARTIES

The only other parties not listed in the caption are those parties who are the previous successors in interest to the lien against Buchanan's homestead. The names of these parties are: Federal Deposit Insurance Corporation, as Manager of the FSLIC Resolution Trust Fund, as Receiver for First Texas Savings Association, Dallas, Texas, and First Gibraltar Bank, FSB. Petitioner will be referred to as "Buchanan," and Respondent will be referred to as "the regulator." This Court's decision in *D'Oench, Duhme Co. v. FDIC*, 315 U.S. 447 (1942), will be referred to as "the *D'Oench, Duhme* doctrine."

TABLE OF CONTENTS

TABLE OF CASE AUTHORITIES

DECISIONS BELOW

The decision of the United States Court of Appeals, Fifth Circuit, is reported at 935 F.2d 83. It is reproduced in Appendix A. The decision of the district court is not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals (App. A, infra pp. 9-15) was entered on July 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U. S. Constitution, Article 14, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 12 U.S.C. §1823(e):

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement--
>
> (1) is in writing,
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

3. Texas Constitution, Article 1, §3:

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

4. Texas Property Code §13.002:

> An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument.

STATEMENT OF THE CASE

Petitioner, Leila Buchanan, filed this suit in state court, in January 1987, for injunctive and statutory relief against First Texas Savings Association of Dallas, Texas, (hereinafter "First Texas") to contest the validity of a lien against her homestead. During the pendency of the suit, in December, 1988, Respondent, Federal Savings and Loan Insurance Corporation (hereinafter "FSLIC"), became Receiver of First Texas and thereafter removed the case to the United States District Court for the Western District of Texas, Waco Division. Subsequently, the FSLIC assigned the title to petitioner's homestead to Respondent First Gibraltar Bank, FSB (hereinafter "First Gibraltar") who intervened in the removed action. The trial court granted Respondent First Gibraltar's motion to dismiss, and petitioner appealed.

The facts (and material issues of state law) were undisputed. While Buchanan was away from her homestead, her son contracted for siding work which was almost complete when she returned. At that time, Buchanan signed the lien agreement containing an incorrect recital that no siding work began and no materials were provided prior to Buchanan's signing of the agreement. Despite this incorrect recital in the lien agreement, the lien on Buchanan's homestead was void under state law as a result of the undisputed provision of material and beginning of siding work prior to Buchanan's signing of the agreement. (Texas Homestead Laws are reproduced in Appendix B.)

The Court of Appeals for the Fifth Circuit affirmed the decision of the trial court finding that petitioner "lent herself" to a misleading "scheme" or "arrangement" that barred her claims under the *D'Oench, Duhme* doctrine. *Buchanan v. Federal Savings and Loan Insurance Corporation*, 935 F.2d 83 (5th Cir. 1991).

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Fifth Circuit has denied Buchanan equal protection of her rights under the Texas homestead laws. In *Patterson v. Federal Deposit Ins. Corp.*, 918 F.2d 540 (5th Cir. 1990), the same Court of Appeals held that Texas homestead rights could be asserted against the regulator even though the homestead claim was inconsistent with a misleading deed of trust containing a homestead disclaimer. This case is substantially identical to *Patterson*, yet the Court of Appeals refused to allow Buchanan's homestead claim.

Buchanan did not lend herself to a "scheme or arrangement" within the meaning of the *D'Oench, Duhme* doctrine. Buchanan did not act with intent to deceive nor did she act recklessly. In fact, Buchanan's conduct was substantively no different that the conduct in *Patterson*, yet Patterson was found not to have lent herself to a scheme or arrangement. Moreover, the regulator had both constructive and actual notice of Buchanan's homestead claim prior to the regulator's takeover.

ARGUMENT

Petitioner has been denied equal protection of the law.

In *Patterson*, the Court of Appeals for the Fifth Circuit correctly recognized that Texas homestead laws create an "inalienable constitutional right." 918 F.2d 544. Because Patterson and Buchanan are/were similarly situated, and because Buchanan's but not Patterson's homestead claim was barred by *D'Oench, Duhme*,[1] Buchanan has been denied equal protection under the Texas and United States Constitutions. Texas Constitution, Art. I, §3; U.S. Constitution, Article 14, §1.

A. Patterson and Petitioner engaged in similar conduct but have been treated differently by the Court of Appeals for the Fifth Circuit.

The Court of Appeals found that Buchanan "lent herself to a scheme or arrangement" by signing a contract containing a recital "she knew was wrong." 935 F.2d 86. Likewise, Patterson signed a deed of trust that contained a homestead disclaimer which Patterson knew was wrong. *See, Patterson*, 918 F.2d 546, where the Court rejected Patterson's argument that she did not know the contents of the writing she signed. In this case, however, the Court of Appeals found that Buchanan was estopped from asserting her homestead claim because she acted "inequitably" in signing a document she knew was wrong and then attempted to use the inaccuracy of that document to preserve her homestead. 935 F.2d at 86. In *Patterson*, the same Court of Appeals found nothing

---

[1]It would not be reasonable to distinguish Patterson's situation from Buchanan's merely because the *Patterson* case involved 12 U.S.C. §1823(e), while the Court of Appeals "approach[ed] this case solely in terms of the *D'Oench, Duhme* doctrine." 935 F.2d at 85, n.4. As the Court of Appeals itself noted, §1823(e) is merely the *D'Oench, Duhme* doctrine's "statutory analogue." *Id.*

"inequitable" to estop Patterson from asserting her homestead claim even though she signed a document she knew was wrong and then used the inaccuracy of that document to preserve her homestead.

The only arguable difference between the Patterson and Buchanan "situations" is that, in *Patterson*, the FDIC had no prior notice of the homestead claim, while in this case the regulator did have prior notice of the homestead claim. In *Patterson*, the regulatory takeover occurred prior to Patterson's suit for declaratory judgment invalidating the lien on her homestead, 918 F.2d at 542, while in this case Buchanan's suit for declaratory relief from the lien on her homestead had been pending before the regulatory takeover. 935 F.2d at 84-85. As a result of the pendency of Buchanan's suit prior to regulatory takeover, the Court can take judicial notice that the records of the failed institution reflected Buchanan's challenge to the foreclosure of her property. These records of the failed institution certainly included copies of Buchanan's pleadings (challenging the foreclosure) filed prior to the regulatory takeover. The appellate record does not support the assertion by the Court of Appeals that "First Texas's records in no way reflected Buchanan's challenge to the foreclosure of her property." 935 F.2d at 86 n.5.

Moreover, the Court of Appeals erroneously held that the regulator "is under no obligation to pore through public records to determine whether title to any of the institution's assets is in dispute . . ." *Id.* The Court of Appeals apparently felt compelled to make this holding because it is undisputed that Buchanan filed a notice of *lis pendens* prior to regulatory takeover, which notice constituted "notice to all persons of the existence of the instrument." TEX. PROP. CODE ANN., §13.002. This same Court of Appeals held in *Patterson* that the regulator is charged with knowledge of the homestead claimant's actual use and possession of the homestead property. 918 F.2d at 546-547. Why is the regulator charged with notice of property possession but not

with notice of public (and properly recorded) records? No rational basis exists for distinguishing these two situations.

The Patterson and Buchanan "situations" are identical with respect to constructive notice of the homestead claim. Buchanan's situation is even more compelling than the Patterson situation with respect to the regulator's actual prior notice of the homestead claim. In this case, the regulator had actual prior notice, while in *Patterson* the regulator did not.

B. Buchanan did not lend herself to any "scheme or arrangement."

As defined in the dictionary, "scheme" specifically means a design or plan, while "arrangement" is a more general term which could include "schemes," "designs," and "plans." Webster's Ninth New Collegiate Dictionary, 1983, pp.104, 343, 898, 1050. All of these words imply some sort of conscious intention, and the authorities in which "schemes" and/or "arrangements" have been found (in the context relevant to this case) have generally involved some active intention to deceive. *See e.g., Templin v. Weisgram*, 867 F.2d 240 (5th Cir. 1989) (pretended sale of homestead). The only exception to this general rule has been "reckless" conduct such as that involved in *FDIC v. McClanahan*, 795 F.2d 512 (5th Cir. 1986)(borrower signed blank note at request of loan officer whom borrower knew had been convicted of bank fraud, and loan officer pocketed proceeds of note after "filling in the blanks").

The Court of Appeals did not find, and no evidence in the appellate record exists, that Buchanan intended to mislead or deceive anyone when she signed the contract in question. Nor does the Court of Appeals find that Buchanan's conduct was "reckless" like the conducted involved in the *McClanahan* case. *See, Buchanan*, 935 F.2d at 86, penultimate paragraph of opinion. Despite the dissimilarity between Buchanan's conduct and conduct previously held to be a "scheme or arrangement," the Court of

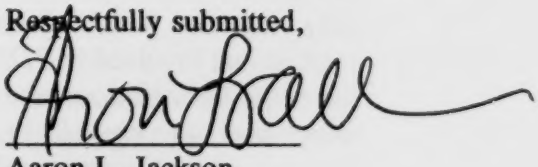
Appeals found that Buchanan "lent herself to a scheme or arrangement" likely to mislead the regulator. *Id.*

Buchanan submits to this Court that there was no "scheme or arrangement" in this case as those terms have been used in the application of the *D'Oench, Duhme* doctrine. There was no intent to deceive, and there was no "reckless" conduct. Moreover, if signing a document containing an inaccuracy creates a "scheme or arrangement" under the *D'Oench, Duhme* doctrine in the Fifth Circuit, Ms. Patterson was similarly situated in the *Patterson* case but was not found to have lent herself to a "scheme or arrangement." Such unequal treatment of similarly situated persons violates Buchanan's right to equal protection of the law.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



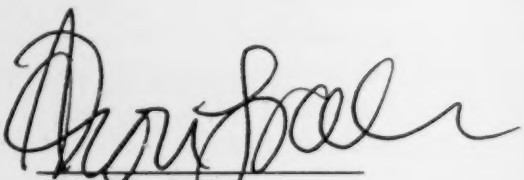
Aaron L. Jackson
Attorney
Ford & Ferraro
98 San Jacinto Blvd.
Suite 2000
Austin, TX 78701
512/476-2020

Attorney for Petitioner,
Leila Buchanan

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the following counsel of record on October 8, 1991, by certified mail, return receipt requested:

Mark C. Taylor
Liddell, Sapp, Zivley, Hill & Laboon
1200 Texas Commerce Tower
2200 Ross Avenue
Dallas, Texas 75201



Aaron L. Jackson

APPENDIX A

BUCHANAN v. FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

Leila BUCHANAN, Plaintiff-Appellant,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
as Receiver for First Texas Savings Association,
Dallas, Texas, et al., Defendants,

First Gibraltar Bank, FSB, Intervening
Defendant-Appellee.

No. 90-8428.

United States Court of Appeals,
Fifth Circuit.

July 10, 1991.

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, SMITH, and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In this case, First Texas Savings Association (First Texas) foreclosed on plaintiff Leila Buchanan's house after she failed to make payments for vinyl siding. She brought suit against First Texas, claiming that the lien against her house was void because she signed the contract creating the lien *after* work on the house had begun, in contravention of Texas law and an express recital in the contract.

After First Texas became insolvent, the Federal Savings and Loan Insurance Corporation (FSLIC) became receiver and transferred the assets of the failed financial institution to defendant First Gibraltar Bank, FSB (First Gibraltar). After removal to federal court, First Gibraltar successfully argued that Buchanan, by signing the contract despite her knowledge of the inaccuracy of the recital, lent herself to a scheme or arrangement likely to mislead banking authorities and that the so-called *D'Oench, Duhme* doctrine therefore barred her claims.[1] We affirm.

I.

Buchanan and her son, Robert, entered into an agreement with Southwest Exteriors, Inc. (Southwest), under which Southwest would affix vinyl siding to Buchanan's house for the sum of $11,900. One provision of the contract stated, "This contract is executed and delivered *before* any labor has been performed and *before* any material has been furnished for the construction of the improvements for which the lien hereby created is given." (Emphasis added.) Despite this recital, Buchanan now claims that she signed the contract *after* the work began, her son having earlier entered into the agreement in her absence.

---

[1]The district court had granted dismissal in favor of the Federal Deposit Insurance Corporation (FDIC), which was acting as manager of the FSLIC Resolution Fund, as receiver for First Texas.

Under the contract, Buchanan could either pay the contract price in full or finance the cost over ten years; she chose the latter option. When she failed to make payments, First Texas, to which Southwest had assigned the lien, foreclosed pursuant to a mechanic's lien created by the contract of sale.

II.

After foreclosure, Buchanan brought suit in state court against First Texas, seeking both damages under the Texas Deceptive Trade Practices Act and a declaratory judgment that the lien was void and that she thus still owned the house.[2] After the suit was filed, First Texas became insolvent, and the FSLIC was appointed receiver. First Gibraltar subsequently acquired all of the assets but only certain of the tax, secured, and deposit liabilities of First Texas from the FSLIC. While the case was pending in state court, Buchanan filed a *lis pendens* in the local property records indicating her challenge to First Texas's ownership of what had been her property.

The FSLIC removed the case to federal court. First Gibraltar successfully intervened and is now the only defendant-appellee. Buchanan and First Gibraltar filed cross motions for summary

---

[2]For this latter assertion, Buchanan relied upon the Texas Property Code, which provides in pertinent part as follows:

> (b) Encumbrances may be properly fixed on homestead property for: . . .
>
> (3) work and material used in constructing improvements on the property if contracted for in writing before the material is furnished or the labor is performed. . . .

Tex. Prop. Code Ann. § 41.001(b)(3) (Vernon Supp. 1991). *See also id.* § 53.059 (Vernon 1984) (describing procedure for fixing lien on homestead).

judgment; the court granted First Gibraltar's motion and dismissed the case.

III.

In this case, the debtor challenged a creditor's foreclosure of the collateral securing her debt, arguing that the lien was void from the start.[3] Instead of rebutting this argument on the merits, the creditor contended that federal law[4] bars the debtor's contention; the district court agreed.

When determining whether the *D'Oench, Duhme* doctrine bars the assertion of a claim against the FSLIC (or its successor in interest), we must ask whether the party "lent [her]self to a scheme or arrangement whereby the banking authority on which [the FDIC] relied in insuring the bank was or was likely to be misled." *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 460, 62 S.Ct. 676, 681, 86 L.Ed. 956 (1942).

In *D'Oench, Duhme*, banking officials entered into side agreements that undermined the bank examiner's ability to rely upon bank records, thereby frustrating the government's insurance and regulatory policies. To address this concern, the Court adopted a rule of estoppel under which a party that had "lent himself to a scheme or arrangement" could not make a claim based thereupon.

---

[3]We assume for purposes of this opinion that the lien is void under Texas law.

[4]Although First Gibraltar invoked both *D'Oench, Duhme* and 12 U.S.C. § 1823(e) (the doctrine's statutory analogue), we approach this case solely in terms of the *D'Oench, Duhme* doctrine.

Before considering the particular facts of the instant case, it is important to note that *D'Oench, Duhme* does *not* preclude *all* claims that would upset the FDIC's expectations: "*D'Oench, Duhme* has not been read to mean that there can be no defenses at all to attempts by the FDIC to collect on promissory notes." *FDIC v. McClanahan*, 795 F.2d 512, 515 (5th Cir. 1986). For example, in *McClanahan* there was an $86,000 note that had been forged; when the FDIC took over the bank that was the creditor on the note, it assumed that the note was good. However, the fact that the Corporation's expectations would be defeated by recognition of the forgery defense did not prevent the court from concluding that the FDIC could not have sued the putative maker whose name had been forged. *Id.*

[1] Accordingly, *D'Oench, Duhme* does not apply in all situations in which acceptance of a party's claim would defeat the government's expectations. The problem, of course, is determining when it does and does not apply. The *D'Oench, Duhme* court's own articulation of the applicable test provides some insight: A party's claim is barred if that party "*lent himself* to a scheme or arrangement whereby the banking authority on which [the FDIC] relied in insuring the bank was or was likely to be misled." 315 U.S. at 460, 62 S.Ct., at 681 (emphasis added).

This "lent himself" language has caused courts to focus upon the relative culpability of the party making the claim that would defeat the FDIC's expectations. For example, in *FDIC v. Meo*, 505 F.2d 790 (9th Cir. 1974), the defendant desired to invest in a particular bank's stock. He borrowed money from that same bank and intended that the bank keep the stock certificates as security. However, the bank erroneously arranged for the issuance of voting trust certificates instead of stock.

When the bank became insolvent and the investor became delinquent in his payments, the FDIC sued him on the note. The investor argued that there was a failure of consideration. The court reversed a judgment for the FDIC, emphasizing that the

maker was "wholly innocent" and was "not negligent in failing to discover the manner in which the stock order was actually executed." *Id.* at 792.

In *McClanahan* we also focused upon the relative culpability of the party making the claim that would defeat the FDIC's expectations. In this case, the defendant sought a $31,000 loan from a bank. One Orrin Shaid represented to McClanahan that he owned the bank and persuaded McClanahan to sign a blank note even though McClanahan knew that Shaid had been convicted of bank fraud. Shaid filled out the note to reflect a $62,500 loan from the bank to McClanahan and pocketed the money himself. Shaid told McClanahan that the bank had disapproved the loan, but McClanahan imprudently failed to retrieve the blank instrument.

When the FDIC took over the bank, it sued McClanahan on the note. He raised the affirmative defenses of failure of consideration and fraudulent inducement. The FDIC argued that *D'Oench, Duhme* barred him from raising these defenses. The district court found for McClanahan, and the FDIC appealed to this court.

In framing the question for review, we indicated the fact-specific nature of a *D'Oench, Duhme* analysis: "The present question, which is apparently one of first impression in this circuit, concerns the application of the rule of *D'Oench, Duhme* to a maker who signed a blank promissory note with the understanding that it would later be filled in to reflect the terms of a loan that he in fact never received." 795 F.2d at 516.

In reversing the district court's refusal to apply *D'Oench, Duhme*, we focused upon McClanahan's "reckless" conduct, concluding "that Henry McClanahan, rather than the FDIC or the innocent depositors or creditors of the failed bank, must bear the consequences of his unfortunate involvement with Orrin Shaid." *Id.* We concluded that McClanahan "lent himself to a scheme or arrangement whereby the [appropriate] banking authority . . . was

or was likely to be misled. *Id.* at 517 (quoting *D'Oench, Duhme*, 315 U.S. at 460, 62 S.Ct. at 681).

[2] Although Buchanan's conduct was not as "reckless" and ill-advised as McClanahan's, she nonetheless "lent herself to a scheme or arrangement" that was likely to mislead the FSLIC. She signed a contract containing a recital she knew was wrong. It is inequitable for her now to reverse course and use the inaccuracy of that recital to gain relief from foreclosure.

[3, 4] In conclusion, Buchanan "lent herself" to a misleading scheme or arrangement, and thus the *D'Oench, Duhme* doctrine bars her claims. We note that our holding serves the purposes of the *D'Oench, Duhme* doctrine, enabling regulatory authorities to rely upon bank records.[5]

The district court's judgment is hereby AFFIRMED.

---

[5]Promoting the government's ability to rely upon the financial institution's records is the prime purpose of the *D'Oench, Duhme* doctrine. Buchanan's argument that her filing of a *lis pendens* somehow estops the FSLIC and its successor from asserting *D'Oench, Duhme* is without merit. When the government takes over a failing financial institution, it is under no obligation to pore through public records to determine whether title to any of the institution's assets is in dispute; in other words, the regulatory authority is entitled to rely upon the institution's records. First Texas's records in no way reflected Buchanan's challenge to the foreclosure of her property.

APPENDIX B

TEXAS HOMESTEAD LAWS

Texas Constitution, Article 16, §50:

The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void. This amendment shall become effective upon its adoption.

Texas Property Code §53.059

(a) To fix the lien on a homestead, the person who is to furnish material or perform labor and the owner must execute a written contract setting forth the terms of the agreement.

(b) The contract must be entered before the material is furnished or the labor is performed.

(c) If the owner is married, the contract must be signed by both spouses.

(d) The contract must be filed with the county clerk of the county in which the homestead is located, who shall record it in records kept for that purpose.

(e) If the contract is made and recorded by an original contractor, the contract inures to the benefit of all persons who labor or furnish material for the original contractor.

(f), (g) [blank]

(h) A lien affidavit under Subchapter C that relates to a homestead must contain the following notice conspicuously printed, stamped, or typed in a size equal to at least 10-point boldface or computer equivalent, at the top of the page:

"NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN."

(i) For the lien on a homestead to be valid, the notice required to be given to the owner under Section 53.056, or 53.058, as applicable, must include or have attached the following statement:

> "If a person who furnishes materials or performs labor for construction of improvements on your property is not paid, your property may be subject to a lien for the unpaid amount if:
>
> (1) after receiving notice of the unpaid claim from the claimant, you fail to withhold payment to

your contractor that is sufficient to cover the unpaid claim until the dispute is resolved; or

(2) during construction and for 30 days after completion of construction, you fail to retain 10 percent of the contract price of 10 percent of the value of the work performed by your contractor.

If you have complied with the law regarding the 10 percent retainage and you have withheld payment to the contractor sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by a subcontractor or supplier, other than a person who contracted directly with you, will not be a valid lien on your property. In addition, except for the required 10 percent retainage, you are not liable to a subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim."

Texas Property Code §41.001

(a) A homestead and one or more lots used for a place of burial of the dead are exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.

(b) Encumbrances may be properly fixed on homestead property for:

(1) purchase money;

(2) taxes on the property; or

(3) work and material used in constructing improvements on the property if contracted for in writing before the material is furnished or the labor is performed and in a manner required for the conveyance of a

homestead, with joinder of both spouses if the homestead claimant is married.

(c) The homestead claimant's proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale.

(2)

No. 91-645

In The

Supreme Court of the United States

October Term, 1991

LEILA BUCHANAN,

Petitioner,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, as Receiver for First Texas Savings Association, Dallas, Texas, ET AL.,

and

FIRST GIBRALTAR BANK, FSB,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GREGORY N. WOODS
Counsel of Record
MARK C. TAYLOR
LIDDELL, SAPP, ZIVLEY, HILL & LABOON, L.L.P.
1200 Texas Commerce Tower
2200 Ross Avenue
Dallas, Texas 75201

Attorneys for First Gibraltar Bank, FSB

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Court of Appeals was correct in its determination that: (a) Buchanan's claims are barred by the protection given First Gibraltar Bank, FSB by the *D'Oench, Duhme* doctrine; and (b) First Gibraltar Bank, FSB cannot be charged with such "notice" of Buchanan's claims so as to defeat its protections under federal law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CITES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

No. 91-645

In The

Supreme Court of the United States

October Term, 1991

LEILA BUCHANAN,

Petitioner,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, as Receiver for First Texas Savings Association, Dallas, Texas, ET AL.,

and

FIRST GIBRALTAR BANK, FSB,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent First Gibraltar Bank, FSB ("First Gibraltar") respectfully files this Brief in Opposition to the Petition for Writ of Certiorari of Petitioner Leila Buchanan ("Buchanan") and would show as follows:

STATEMENT OF THE CASE

This action was originally brought in Texas state court by Petitioner Buchanan seeking recovery of damages under the Texas Consumer Protection-Deceptive Trade Practices Act and a declaratory judgment voiding a foreclosure sale of her home conducted by First Texas Savings Association ("FTSA"). On January 26, 1989, the action was removed to federal district court by the Federal Savings and Loan Insurance Corporation ("FSLIC"), after its appointment as Receiver for FTSA. Subsequently, on May 3, 1990, First Gibraltar filed its Motion to Intervene as of Right or, Alternatively, for Permissive Intervention. First Gibraltar obtained an interest in the case after it acquired substantially all of the assets, but only certain tax, secured and deposit liabilities, of FTSA from the FSLIC as receiver for FTSA. On May 10, 1990, the district court granted First Gibraltar's Motion for Permissive Intervention. On July 6, 1990, the district court entered its Judgment dismissing Plaintiff's causes of action against First Gibraltar, holding that Buchanan's claims were barred by federal law.

First Gibraltar essentially agrees with the factual statement present by Buchanan, except for Buchanan's statement that: "While she was away from her homestead, her son contracted for siding work which was almost complete when she returned." [Petition, p. 3]. There was no support in the record below for this statement. Significantly, Buchanan's assertion is refuted by language of the Mechanic's and Materialmen's Contract with Power of Sale ("Mechanic's Lien Contract") executed by Buchanan in favor of FTSA stating that: "This contract is executed and delivered before any labor has

been performed and before any material has been furnished for the construction of the improvements for which the lien hereby created is given." No other statement or agreement regarding this matter exists in the books and records of FTSA.

SUMMARY OF THE ARGUMENT

In her action, Buchanan sought to void the foreclosure sale of her home, asserting that the mechanic's lien held by FTSA was void. As alleged by Buchanan, the Mechanic's Lien Contract was executed *after* construction had been performed. As such, Buchanan seeks the benefit of a secret agreement which would contradict the express terms of the Mechanic's Lien Contract, and would invalidate a facially valid instrument. Clearly, Buchanan, by executing the Mechanic's Lien Contract when work had already begun, lent herself to a scheme likely to mislead banking authorities. As such, Buchanan's claims are barred by the *D'Oench, Duhme* doctrine.

By purchasing the asset at issue from the FSLIC, as receiver for FTSA, First Gibraltar acquired the protections afforded FSLIC under federal law. Although Buchanan contends that First Gibraltar had "notice" of her alleged defense, First Gibraltar's protections are not defeated by a public filing such as a *lis pendens*. In any event, recent case law is clear that this type of "notice" will not defeat such protections.

ARGUMENT AND AUTHORITIES

I. FEDERAL LAW PRECLUDES BUCHANAN'S ASSERTION THAT THE LIEN ON HER HOMESTEAD WAS INVALID

A. The D'Oench, Duhme Doctrine Bars Buchanan's Claims

Buchanan contends that because FTSA allegedly failed to obtain her signature prior to commencing construction, the lien created against her homestead was void. Because the lien was invalid, Buchanan asserts, no title or interest in her home passed from FSLIC to First Gibraltar, so that the *D'Oench, Duhme* doctrine and §1823(3) are inapplicable. The protections afforded First Gibraltar by federal law, however, override Buchanan's purported homestead protection in this case.

The Court below properly determined that the *D'Oench, Duhme* doctrine barred Buchanan's claim, because she had lent herself to a scheme likely to mislead regulators. In *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), the United States Supreme Court articulated a policy designed to preclude claims not appearing on the face of the records of a savings and loan or bank placed in receivership. In *D'Oench, Duhme*, this Court held that secret agreements designed to deceive the banking authorities, or that would tend to have that effect, may not be asserted as a defense against the FDIC suing in its corporate capacity. The underlying rationale of the rule is that banking authorities are entitled to rely on the books and records of a financial institution. Thus, a person who, to accommodate a bank, executes an instrument which is in the form of a binding obligation, is estopped from

arguing that the parties agreed that the instrument would not be enforced. *D'Oench, Duhme*, 315 U.S. at 461; *FSLIC v. Wilson*, 722 F.Supp. 306, 312 (N.D. Tex. 1989).

D'Oench, Duhme and its progeny have since been extended far beyond the situation in which the lender and borrower secretly agree that an obligation will not be enforced. Moreover, Congress enacted Section 1823(e) of Title 12 which provides:

> [N]o agreement which tends to defeat the interest of the Corporation and any asset acquired by it under this section or section 1821 of this title, either as security for a loan of by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution, (3) was approved by the Board of Directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee and (4) has been, continuously, from the time of its execution, an official record of the depository institution.

This Court construed §1823(e) expansively in *Langley v. FDIC*, 484 U.S. 86 (1987). In *Langley*, the Langleys alleged that the insolvent bank had misrepresented certain existing facts upon which they relied in executing the note that was the subject of the lawsuit; however, no reference to the alleged representations appeared in the records of the failed bank. This Court held that under §1823(e) a borrower who signs a facially unqualified note subject to

unwritten conditions or understandings "has lent himself to a scheme or arrangement whereby the banking authority . . . was likely to be mislead, whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme*), or of the truthfulness of a warranted fact." *Id.* at 90. Accordingly, the Court rejected the Langleys' claims and found them liable on the note.

As noted by the Fifth Circuit, the aims of both §1823(e) and *D'Oench, Duhme* are identical, and the reasoning applied in §1823(e) cases is applicable to *D'Oench, Duhme* cases. *Olney Savings & Loan Ass'n v. Trinity Banc Savings Ass'n*, 885 F.2d 266, 274 (5th Cir. 1989). The Fifth Circuit has also extended the protections of *D'Oench, Duhme* to private parties, such as First Gibraltar, that purchase the assets of a failed institution from the FDIC (or formerly, the FSLIC). *Porras v. Petroplex Savings Ass'n.*, 903 F.2d 379, 381 (5th Cir. 1990). Thus, the policies and protections arising from §1823(e) and *D'Oench, Duhme* are applicable to this case.

In *FSLIC v. Griffin*, 935 F.2d 691 (5th Cir. 1991), the closed institution, and later First Gibraltar, pursued Griffin on a deficiency suit based on a guaranty. Griffin asserted four affirmative defenses: breach of partnership duties, usury, wrongful foreclosure, and breach of an agreement to fund. In affirming the summary judgment in favor of First Gibraltar, the Fifth Circuit stated:

> Griffin also tries to avoid application of *D'Oench, Duhme* by arguing that First Gibraltar failed to prove that *D'Oench, Duhme* applies to Griffin's defenses for two reasons. One, First Gibraltar allegedly failed to prove that the four

> affirmative defenses are based on secret agreements. Two, First Gibraltar allegedly failed to prove the Griffin lent himself to a "scheme" to mislead the banking authorities.
>
> The requirements of *D'Oench, Duhme* are met. The agreements alleged here are unenforceable because they are not reflected in the bank's records. *Campbell Leasing, Inc. v. Federal Deposit Ins. Corp.*, 901 F.2d 1244, 1248 (5th Cir. 1990). They need not be "secret," only outside the bank's records. In addition, an actual scheme is not required as Griffin alleges. All that is relevant is that the agreements are not in the files. Such unfiled agreements leave the regulators without warning that they exist. "Even Borrowers who are innocent of any intent to mislead banking authorities are covered by the doctrine if they lend themselves to an arrangement which is likely to do so." *Id.* The alleged side oral agreements (i.e. agreement to form a partnership, agreement to fund subsequent loans, and the agreement to bid in the property at a specified price) all have the effect of misleading regulatory authorities.

Griffin, 935 F.2d at 698-99. As dictated by the *Griffin* decision, proof of a "scheme" or a "secret agreement" is not necessary for application of the *D'Oench, Duhme* doctrine.

Similarly, the courts have held under federal law, banking authorities "are likely to be mislead" if an obligor is permitted to assert some arrangement which does not appear in the official records of a failed bank and which has the effect of reducing the value of assets formerly held by the failed institution. *Chatham Ventures*

v. FDIC, 651 F.2d 355, 361 (5th Cir. 1982), *cert. denied*, 456 U.S. 972 (1982). It is not necessary that the underlying transaction be fraudulent. *Beighley v. FDIC*, 868 F.2d 776, 784 (5th Cir. 1989). Several types of transactions meet this test.

Courts have applied *D'Oench, Duhme* to bar assertion of oral side agreements in several circumstances. For example, in one case, a borrower executed a promissory note in blank, with the agreement by a bank officer that the guaranty would not be filled in or enforced. When the FDIC later sought to enforce the note after it had been filled in by the bank officer, the borrower argued that his agreement rendered the note enforceable. In rejecting this argument, the Fifth Circuit held that the borrower had lent himself to a scheme likely to mislead banking authorities, because the note was facially valid. *FDIC v. McClanahan*, 795 F.2d 512, 516-17 (5th Cir. 1986). Buchanan seeks to assert just such a side agreement.

Buchanan's entire case depends upon the argument that the Mechanic's Lien Contract is unenforceable because construction had begun, despite the contract's representation to the contrary. Clearly, Buchanan is asserting collateral issues not raised by the records of FTSA. Although discovery was not conducted due to the short time First Gibraltar was involved in this action, Buchanan's claim necessarily rests upon the existence of an oral side agreement – either that the Mechanic's Lien Contract would not be enforced against her home, due to its "invalidity", or that the contract would be enforceable despite the on-going construction. Nowhere is any agreement reflected in FTSA's records. Because the Mechanic's Lien Contract is valid on its face, Buchanan lent herself to

a scheme likely to mislead banking authorities. It was Buchanan's *choice* to execute the Mechanic's Lien Contract, and she is subject to the consequences. *Accord Langley*, 108 S.Ct. at 402; *Beighley*, 868 F.2d at 784; *McClanahan*, 795 F.2d at 516-17. Buchanan's contention that the alleged "voidness" of the mechanic's lien renders the federal protections inapplicable is likewise misplaced.

Buchanan's claims are similar to those that were before the Fifth Circuit in *Templin v. Weisgram*, 867 F.2d 240 (5th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 63 (1989). In *Templin*, the borrowers made an oral agreement with the bank and a third party to loan money to the borrowers, secured by the borrowers' homestead, through a simulated sale to the third party. The parties executed a warranty deed, promissory note and deed of trust, all of which were facially valid. None of the bank's records contained the parties' oral agreement. After the bank failed, the borrowers defaulted on their note, and the FDIC posted the property for foreclosure. One of the borrowers then sought an order restraining the foreclosure sale, arguing that the deed of trust was void under Art. 16, §50 of the Texas Constitution, which declares any pretended sale of a homestead void.

As in this case, the borrower contended that, because the simulated sale was void, §1823(e) was inapplicable because no "right, title or interest" passed to the FDIC. The Fifth Circuit expressly rejected the borrower's contention, holding that:

> Given the focus of section 1823(e), *it is the manner in which an instrument is proven to be void*, not the conclusion that the instrument is void, that determines whether it is within the statute.

Templin, 867 F.2d at 242 (emphasis added). Clearly, Buchanan seeks to void a facially valid instrument by raising collateral issues or agreements not appearing on the fact of the instrument, and which actually contradict the terms of the instrument. While First Gibraltar realizes the broad range of protections given to one's homestead, the policy of avoiding the effect of unrecorded side agreements "overrides even such protections as the homestead exemption protection, like mechanic's liens, under the Texas Constitution." *Aero Support Systems, Inc. v. FDIC*, 726 F.Supp. 651, 653 (N.D. Tex. 1989) (citing *Templin*).

Buchanan's reliance upon the Fifth Circuit's decision in *Patterson v. FDIC*, 918 F.2d 540 (5th Cir. 1990), is also misplaced. Buchanan claims she has been denied equal protection because the Court's opinion below conflicts with the *Patterson* opinion. In *Patterson*, however, the deed of trust was *void* because it was not a purchase money lien or mechanic's lien, therefore, it could *never* attach. In this case, however, the lien contract executed by Buchanan *could* validly attach a lien to her homestead, but for the alleged status of the work. Her current efforts to contradict the terms of a facially valid agreement present a classic *D'Oench, Duhme* situation. Thus, the facts presented here are significantly different than those present in *Patterson* and there is no "conflict" of decision or denial of equal protection.

B. First Gibraltar's Alleged "Notice of Buchanan's Claims Does Not Defeat Its Federal Law Protections

Buchanan also contends that, because she filed a notice of *lis pendens* regarding her claims, First Gibraltar

had "notice" of her claims. Buchanan's contention is misplaced, however, because the critical issue is that there is no evidence of the agreement between Buchanan and FTSA, whatever its nature, in the bank's records. The only purported "notice" was a one page Notice of *Lis Pendens* filed in the county records.

As the Court below noted, the very speed of purchase and assumption transaction necessitates a hasty review of bank records. *Buchanan v. FSLIC*, 935 F.2d 83, 86 n.5 (5th Cir. 1991). *See also Gunther v. Hutcheson*, 674 F.2d 862, 865 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982). Federal regulators are under no duty to search a bank's records to find evidence of a claimed lien or public notice. *Aero Support*, 726 F.Supp. at 653; *see also FDIC v. Wood*, 758 F.2d 156, 162 (6th Cir. 1985). Such a duty would impose an unrealistic and unreasonable burden on bank regulators, who must be allowed to rely upon the records in the files of the bank when structuring a purchase and assumption transaction. *See FSLIC v. Murray*, 853 F.2d 1251, 1256 (5th Cir. 1988). Accordingly, the Fifth Circuit was correct in its determination that Buchanan's claim of "notice" was "without merit".

CONCLUSION

Simply put, Buchanan is attempting to avoid the effect of an instrument, *valid on its face*, by raising collateral issues not apparent from FTSA's records, and which contradict the express terms of the instrument. Buchanan can only void FTSA's lien by proper written proof concerning the validity of the underlying agreements.

Buchanan has none. First Gibraltar, as transferee from the FSLIC, is entitled to the protections afforded by the *D'Oench, Duhme* doctrine. As such, Buchanan's claims must fail, and the Court's opinion below was in all things correct.

Respectfully submitted,

GREGORY N. WOODS
Counsel of Record
MARK C. TAYLOR
LIDDELL, SAPP, ZIVLEY, HILL
AND LABOON, L.L.P.
2200 Ross Avenue
1200 Texas Commerce Tower
Dallas, Texas 75201
Telephone: 214/220-4800
Telecopy: 214/220-4899

Attorneys for First Gibraltar Bank, FSB